BRIEF FOR RESPONDENTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 15-1059

AT&T CORP.,

PETITIONER,

V.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

RESPONDENTS.

ON PETITION FOR REVIEW OF AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. BAER
ASSISTANT ATTORNEY GENERAL

ROBERT B. NICHOLSON
ROBERT J. WIGGERS
ATTORNEYS

UNITED STATES
DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20530

JONATHAN B. SALLET
GENERAL COUNSEL

DAVID M. GOSSETT
DEPUTY GENERAL COUNSEL

JACOB M. LEWIS
ASSOCIATE GENERAL COUNSEL

RICHARD K. WELCH
DEPUTY ASSOCIATE GENERAL COUNSEL

LISA S. GELB
COUNSEL

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554
(202) 418-1740

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

1. Parties.

Petitioner: AT&T Corp.

Respondents: Federal Communications Commission and United States of America

Intervenors in support of Respondents: Bandwidth.com, Inc., Broadvox-CLEC, LLC, and Level 3 Communications, LLC

2. Rulings under review.

The ruling under review is the Federal Communications Commission's Declaratory Ruling, *Matter of Connect America Fund, Developing a Unified Intercarrier Compensation Regime*, WC Docket No. 10-90, *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, 30 FCC Rcd 1587 (2015) (JA __). The Declaratory Ruling was adopted on February 2, 2015 and released on February 11, 2015. It was not published in the Federal Register.

3. Related cases.

The undersigned counsel are not aware of any related cases filed in this Court or any related cases pending in any other court.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

ADMINISTRATIVE DECISIONS

TREATISES

OTHER AUTHORITIES

* *Cases and other authorities principally relied upon are marked with asterisks.*

GLOSSARY

VoIP	Voice over Internet Protocol; a method used to send and receive voice calls using a broadband Internet connection rather than a traditional analog telephone

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JURISDICTION

AT&T Corp. (AT&T) seeks review of a final Federal Communications Commission Declaratory Ruling, *Matter of Connect America Fund, Developing a Unified Intercarrier Compensation Regime*, 30 FCC Rcd 1587 (2015) (*Declaratory Ruling*) (JA __). The *Declaratory Ruling* was released on February 11, 2015. AT&T filed its petition for review on March 18, 2015, within the 60-day time period specified by 28 U.S.C. §§ 2342(1) and 2344, and 47 U.S.C. § 402(a).

QUESTIONS PRESENTED

In 2011, in the course of a comprehensive overhaul of the rules governing compensation between telecommunications carriers, the Commission adopted a rule (the "VoIP symmetry rule"), 47 C.F.R. § 51.913(b), governing intercarrier compensation for carriers using Voice over Internet Protocol (VoIP) technology. After disputes arose between carriers about the scope of the VoIP symmetry rule, the Commission adopted the *Declaratory Ruling* under review, which clarified that carriers paired with so-called "over-the-top" VoIP providers—VoIP providers that do not also provide the Internet connection to customers over which the VoIP calls are routed—may assess and collect end-office switching charges. The questions presented are:

1. Did the Commission properly exercise its discretion under 5 U.S.C. § 554(e) by issuing a declaratory ruling to clarify that carriers that partner with over-the-top VoIP providers are entitled to recover end-office switching charges under the VoIP symmetry rule?
2. Did the Commission reasonably find that its declaratory ruling should apply retroactively, in accordance with the presumption of retroactivity that attaches to adjudicatory decisions?

STATUTES AND REGULATIONS

Pertinent statutes and regulations are appended to this brief.

COUNTERSTATEMENT

A. Voice over Internet Protocol, Or "VoIP," Telephony

Traditional telephone service, using "time-division multiplexing" technology over copper wires,[1] is giving way to service that transmits voice telephone calls using Internet Protocol technology ("VoIP" calls) over any number of types of connections, including "copper, co-axial cable, wireless, and fiber . . . physical infrastructure." *Declaratory Ruling* ¶1 n.1 (JA __).

Two aspects of the way VoIP telephony works and is regulated are necessary background to understand this litigation. First, many VoIP providers are "facilities-based"—that is, "they provide the last-mile facility," *i.e.* connection via wire, cable or fiber, "to the customer *as well as* the VoIP service." *Declaratory Ruling*, ¶2 (JA __) (emphasis added). For example, a cable company can provide VoIP telephone service over the coaxial cable it already has connected to the customer's premises for video and broadband

[1] "Multiplexing" is a technique for aggregating multiple calls on a single copper wire (or optical fiber). Jonathan E. Nuechterlein & Philip J. Weiser, DIGITAL CROSSROADS: TELECOMMUNICATIONS LAW AND POLICY IN THE INTERNET AGE 26 (2d ed. 2013). "In the traditional wireline telephone world, the most common form of multiplexing, time-division multiplexing (TDM), 'samples' the signal for a given call many times a second and transmits those samples along with the corresponding samples taken of other calls," and "[e]ach call is preassigned time slots in the multicall transmission; at the other end, this aggregated signal is 'demultiplexed' back into individual signals." *Id*.

Internet access. Some VoIP providers, by contrast—such as Vonage—do not furnish "the last-mile facility" to the customer's premises. *Id*. Instead, these "over-the-top" providers furnish VoIP telephone service but rely on the customer to obtain the underlying Internet service from some other company. *Id*.

Second, VoIP providers of all kinds typically must partner with, and compensate, a local exchange carrier to offer VoIP telephone service to customers. They do this primarily as a means to obtain telephone numbers for the VoIP provider's customers, and to obtain interconnection arrangements with other local and interexchange (long distance) carriers.[2]

B. Intercarrier Compensation and the VoIP Symmetry Rule

1. The Commission has developed, over many decades, intercarrier compensation rules that govern what one telephone company may charge another to access the first company's network when the carriers collaborate to complete telephone calls. Under the traditional access charge rules, local exchange carriers charged interexchange (long distance) carriers for the right

[2] It is unsettled whether VoIP providers themselves have a right to interconnection under section 251 of the Communications Act. And until recently, most VoIP providers were not authorized to obtain telephone numbers directly from the Numbering Administrators. *See Numbering Policies for Modern Communications*, 30 FCC Rcd 6839 (2015).

to originate or terminate interexchange calls on the local carrier's network. Over the years, competitive and technological changes have led the Commission to modify its intercarrier compensation rules.

2. In 2011, the Commission adopted a new long-term default intercarrier compensation methodology—"bill-and-keep"—for all local exchange carriers, in lieu of the traditional system of intercarrier payments. *Connect America Fund*, 26 FCC Rcd 17663, 17904, ¶740, 17932, ¶798 (2011), *aff'd In re FCC 11-161*, 753 F.3d 1015 (10th Cir. 2014), *cert. denied*, 135 S.Ct. 2072 (2015) (*2011 Transformation Order*); *see also* 47 C.F.R. § 51.713. Under a bill-and-keep arrangement, carriers do not assess or collect access charges from other carriers that access the first carrier's network. Instead, each carrier looks first to its own subscribers to cover its network costs, through retail service rates, and then may seek universal service subsidies if necessary. *2011 Transformation Order*, 26 FCC Rcd at 17904, ¶737.

Recognizing that it would take time to fully implement its bill-and-keep reform, the Commission in the same order also adopted a transitional framework for intercarrier compensation. *Id.* at 17934-6 ¶801 & Fig. 9. As part of the transitional framework, the Commission addressed, for the first

time, the compensation that should apply to VoIP traffic.[3] The Commission determined that local exchange carriers could charge the same tariffed interstate access rate for toll VoIP traffic as they could charge for non-VoIP traffic, and similarly could charge the generally applicable reciprocal compensation rates for non-toll VoIP traffic. *2011 Transformation Order*, 26 FCC Rcd at 18008 ¶944; 47 C.F.R. § 51.913(a).

3. As part of the *2011 Transformation Order*, the Commission also adopted a rule (the "VoIP symmetry rule"), 47 C.F.R. § 51.913(b), that addresses how competitive local exchange carriers that partner with a VoIP provider to initiate or complete calls may assess and collect access charges. The VoIP symmetry rule provides that, "[n]otwithstanding any other provision of the Commission's rules," a local exchange carrier may assess and collect the access charges set forth in its tariff from interexchange (long distance) carriers, "regardless of whether the local exchange carrier itself delivers such traffic to the called party's premises or delivers the call to the called party's premises via contractual or other arrangements with an

[3] Specifically, the Commission identified the intercarrier compensation that is owed for traffic exchanged over the traditional telephone network (commonly referred to, at the time of the *2011 Transformation Order*, as the "public switched telephone network") that originates and/or terminates in Internet Protocol format. *See 2011 Transformation Order*, 26 FCC Rcd at 18005, ¶940.

affiliated or unaffiliated provider of . . . VoIP service . . . that does not itself seek to collect [such access] charges . . . for that traffic." 47 C.F.R. § 51.913(b). Thus, the VoIP symmetry rule permits a local exchange carrier to collect access charges from a long-distance carrier even if the local carrier does not itself deliver the call to the called party's premises, but does so through arrangements with a VoIP provider partner.

The VoIP symmetry rule "does not permit a local exchange carrier to charge for functions not performed by [either] the local exchange carrier itself or [by] the affiliated or unaffiliated provider of . . . VoIP service." *Id*. The rule makes clear, however, that "functions provided by [the carrier] as part of transmitting telecommunications between designated points using, in whole or in part, technology other than [time-division multiplexing] transmission in a manner that is comparable to a service offered by a local exchange carrier constitutes the functional equivalent of the incumbent local exchange carrier access service." *Id.* As the Commission explained in the *2011 Transformation Order*, under this rule a carrier may thus charge intercarrier compensation "for functions performed by it and/or its retail VoIP partner, regardless of whether the functions performed or the technology used correspond precisely to those used under a traditional . . . architecture." *2011 Transformation Order*, 26 FCC Rcd at 18027, ¶970.

The access charges that may be assessed and collected under the VoIP symmetry rule are those "set forth in a local exchange carrier's . . . tariff for the access services defined in § 51.903" of the Commission's rules. 47 C.F.R. § 51.913(b). One portion of those access charges are charges for "end office" access services. Section 51.903(d) of those rules defines "*End Office Access Service*" as (i) "[t]he switching of access traffic at the carrier's end office switch and the delivery to or from . . . the called party's premises," (ii) "[t]he routing of interexchange traffic to or from the called party's premises, either directly or via [contract] with an affiliated or unaffiliated entity," or (iii) "[*a*]*ny functional equivalent* of the incumbent local exchange carrier access service provided by a non-incumbent local exchange carrier." 47 C.F.R. § 51.903(d) (emphasis added). Under the rule, therefore, a non-incumbent local exchange carrier may assess and collect end office access charges for service that differs technologically from that provided by the incumbent, so long as its service is the functional equivalent of the incumbent's access service.

4. The *2011 Transformation Order* was subjected to numerous challenges. Those challenges were consolidated in the U.S. Court of Appeals for the Tenth Circuit, which upheld the Commission's decisions on every count. *In re FCC 11-161*, 753 F.3d 1015 (10th Cir. 2014). AT&T raised a

challenge to the validity of the VoIP symmetry rule on Administrative Procedure Act grounds, which the Tenth Circuit rejected. *In re FCC 11-161*, 753 F.3d at 1148-49.

C. The Declaratory Ruling

Shortly after the rules enacted by the *2011 Transformation Order* took effect, disputes arose regarding the interpretation of the VoIP symmetry rule as it related to end-office switching charges. Most interexchange (long-distance) carriers did not dispute their obligation under the VoIP symmetry rule to pay local exchange carriers' end office switching charges for over-the-top VoIP traffic. *See Declaratory Ruling* ¶16 n.54, ¶45 (JA __, __). AT&T, however, asserted that a local exchange carrier pairing with an "over-the-top" VoIP provider to deliver phone calls to its customers does not deliver the functional equivalent of end-office switching and thus may not assess and collect compensation for this access element. AT&T therefore refused to pay charges for end office switching and instead unilaterally decided to pay carriers at the lower rate applicable to so-called "tandem" switching. AT&T Br. at 15.

To quell these disputes about end office switching charges, which various parties raised with the Commission, the Commission on its own motion issued the *Declaratory Ruling* under review, which clarified that "the

VoIP symmetry rule applies in a technology- and facilities-neutral manner," *Declaratory Ruling*, ¶1 (JA ___), and "does not require" that "a competitive [local exchange carrier] or its VoIP provider partner . . . provide the physical last-mile facility to the VoIP provider's end-user customers in order to provide the functional equivalent of end office switching, and thus for the competitive [local exchange carrier] to be eligible to assess access charges for this service," *id.* ¶19 (JA __). *See id.* ¶20 (JA __) ("There is nothing in the [*2011*] *Transformation Order* to suggest that the VoIP symmetry rule intended to draw any distinction between competitive [carriers] partnering with … over-the-top providers").

The Commission rejected claims that the services provided in conjunction with an over-the-top VoIP provider could not be functionally equivalent to traditional end office switching. The Commission emphasized that "[d]irect comparisons between [time-division multiplexing] network architecture and [Internet Protocol] network architecture cannot be made precisely because [Internet Protocol]-based networks do not involve the same types of physical connections as those found in traditional . . . networks." *Declaratory Ruling* ¶27 (JA__). But, it explained, "[t]he fact that the two types of networks are different … does not mean that [Internet Protocol]

networks cannot deliver the functions that are equivalent to end office switching on [time-division multiplexing] networks." *Id*.

The Commission found that, "under the VoIP symmetry rule, the functional equivalent of end-office switching exists when the intelligence associated with call set-up, supervision and management is provided," *Declaratory Ruling* ¶28 (JA __)—in other words, when a competitive local exchange carrier and its VoIP partner provide the information necessary to ensure that calls to and from their customers are initiated, managed and completed properly and that voice traffic reaches its intended destination. Reviewing the record, the Commission determined that competitive local exchange carriers that partner with over-the-top VoIP providers "undoubtedly provide the call intelligence associated with call set-up, supervision and management," and that these functions are the functional equivalent of end-office switching for purposes of the VoIP symmetry rule. *Declaratory Ruling* ¶29 (JA __).

The Commission also determined that no manifest injustice would result if the *Declaratory Ruling*'s clarification of obligations under the VoIP symmetry rule were to be applied retroactively. The Commission explained that "[d]eclaratory rulings are adjudicatory matters, in which retroactivity is presumed," *Declaratory Ruling* ¶48 (JA __); that its clarification was not a

"departure from a prior interpretation that was settled or reasonably clear," *id*. ¶42 (JA __); and that in any event, AT&T could not have reasonably relied on a "contrary reading of the VoIP symmetry rule," *id*. ¶46 (JA __).

STANDARD OF REVIEW

To successfully challenge an agency's declaratory ruling, a party must show that the ruling is arbitrary, capricious, an abuse of discretion, or otherwise contrary to law. *AT&T Corp. v. FCC*, 349 F.3d 692, 698 (D.C. Cir. 2003).

When an agency resolves a controversy by interpreting one of its own rules, it is entitled to considerable deference. The agency's interpretation of its rule is controlling "unless [it is] plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997); *Texas v. EPA*, 726 F.3d 180, 194 (D.C. Cir. 2013).

An agency clarification of existing law is applied retroactively unless "to do otherwise would lead to 'manifest injustice.'" *AT&T Co. v. FCC*, 454 F.3d 329, 332 (D.C. Cir. 2006) (citation omitted).

SUMMARY OF ARGUMENT

1. AT&T frames its primary objection to the *Declaratory Ruling* as a procedural challenge. AT&T alleges that the prior meaning of the VoIP symmetry rule, with respect to end office switching charges, was so clear, and

the Commission's rendering of that meaning in the *Declaratory Ruling* was so far afield from that allegedly clear prior meaning, that the Commission in effect created a new rule. AT&T therefore contends that the Commission was required, and failed, to act through a notice and comment rulemaking.

AT&T's contention is unfounded. The *Declaratory Ruling* reasonably interpreted the rules adopted in the *2011 Transformation Order* and certainly did not modify any rules or upset any well-settled understanding of the VoIP symmetry rule. On the contrary, disputes about the meaning of the VoIP symmetry rule—whether competitive local exchange carriers could impose end office switching charges if the carrier used an over-the top VoIP partner—arose soon after the VoIP symmetry rule took effect.

AT&T argues, however, that the *2011 Transformation Order* that adopted the VoIP symmetry rule expressly embraced prior decisions—some of which were bound up with time-division multiplexing technology—that (in AT&T's view) unequivocally prohibited carriers that partner with over-the-top VoIP providers from collecting end office switching charges. The *2011 Transformation Order* did no such thing. The decisions on which AT&T relies do not address, let alone control, whether the Commission intended the VoIP symmetry rule to draw a distinction between over-the-top and facilities-based VoIP services. As the *Declaratory Ruling* held, "[t]here is nothing in

the [*2011*] *Transformation Order* to suggest that the VoIP symmetry rule intended to draw any distinction between competitive [local exchange carriers] partnering with facilities-based VoIP providers and those partnering with over-the-top VoIP providers." *Declaratory Ruling* ¶20 (JA __).

2. AT&T also asserts that the *Declaratory Ruling*, even if proper, should not be given retroactive effect, because to do so would upset settled law and work a manifest injustice. AT&T has not come close to demonstrating manifest injustice. There was no well-settled industry practice on which AT&T could rely: the controversy about whether a carrier that partners with an over-the-top VoIP provider may assess end office switching charges under the VoIP symmetry rule arose within months of the *2011 Transformation Order*. There was no well-settled agency interpretation of the new rule: AT&T relies solely on a single, staff-level decision from after the *2011 Transformation Order*, but that decision does not address the controversy the Commission resolved in the *Declaratory Ruling*. AT&T took an aggressive, self-help approach by refusing to pay end office switching charges. It did so at its own peril.

As this Court has said, "[t]he mere possibility that a party may have relied on its own (rather convenient) assumption that unclear law would ultimately be resolved in its favor is insufficient to defeat the presumption of

retroactivity when the law is finally clarified." *Qwest Servs. Corp. v. FCC*, 509 F.3d 531, 540 (D.C. Cir. 2007).

ARGUMENT

The Commission properly issued a declaratory ruling to interpret the VoIP symmetry rule. The Commission's decision clarified the rule, but did not change it; the Commission's interpretation did not contravene well-settled industry understanding of the VoIP symmetry rule or contradict relevant Commission or judicial decisions. Further, AT&T has not demonstrated the manifest injustice necessary to overcome the presumption in favor of retroactive application of adjudicatory decisions.

I. THE *DECLARATORY RULING* APPROPRIATELY CLARIFIED THAT COMPETITIVE LOCAL EXCHANGE CARRIERS AND THEIR OVER-THE-TOP VoIP PARTNERS MAY PROVIDE THE FUNCTIONAL EQUIVALENT OF END OFFICE SWITCHING.

In 2011, the Commission decided, for the first time, what compensation interexchange carriers should pay to local exchange carriers and their affiliated VoIP partners for VoIP telephone calls interconnected with the traditional telephone network. That decision was codified in 47 C.F.R. § 51.913(b)—the VoIP symmetry rule—and 47 C.F.R. § 51.903(d), to which the rule refers and which defines end office access service.

The VoIP symmetry rule made clear that the Commission would consider the *function* that the local carrier and its VoIP partner provided, rather than the technology used, to determine whether the local carrier could collect access charges for VoIP traffic. Section 51.913(b) thus provides that "[f]unctions provided by a [local exchange carrier] as part of transmitting telecommunications between designated points using . . . technology other than [time division multiplexing] transmission in a manner that is comparable to a service offered by a local exchange carrier constitutes the functional equivalent of the incumbent local exchange carrier access service." And, more specifically, Section 51.903(d) provides that a carrier can charge for end office switching if it provides the "functional equivalent" of that service. 47 C.F.R. § 51.903(d)(3). Neither the rules nor the *2011 Transformation Order* provided specific guidance about what constituted the functional equivalent of end office switching in the context of VoIP service.

A. The *Declaratory Ruling* Reasonably Interpreted, But Did Not Amend, The VoIP Symmetry Rule.

AT&T's brief is conspicuously silent about the actual VoIP symmetry rule, 47 C.F.R. § 51.913(b), that governs intercarrier compensation for VoIP telephone calls. In the *Declaratory Ruling*, the Commission did not change the text of Section 51.913(b). Nor did it change the text of Section 51.903(d), to which Section 51.913(b) refers. Rather, the Commission resolved a

controversy that had arisen about the *meaning* of the VoIP Symmetry rule—a dispute "surrounding the assessment of end office switching charges under the VoIP symmetry rule as applied to VoIP-[Public Switched Telephone Network] traffic." *Declaratory Ruling*, ¶2 (JA__). Far from altering or amending a rule, the Commission instead merely interpreted the VoIP symmetry rule and clarified that it "does not require a competitive LEC or its VoIP provider partner to provide the physical last-mile facility to the VoIP providers' end user customers in order to provide the functional equivalent of end office switching, and thus for the competitive LEC to be eligible to assess charges for this service." *Declaratory Ruling*, ¶19 (JA__).

It is well settled that the FCC may appropriately interpret a rule through a declaratory ruling or other form of informal adjudication. 5 U.S.C. § 554(e); 47 C.F.R. § 1.2(a). And it is well settled that the FCC need not provide notice and an opportunity to comment before doing so, *see Conference Group v. FCC*, 720 F.3d 957, 966 (D.C. Cir. 2013)—though in fact AT&T and other interexchange and local exchange carriers, as well as VoIP providers, commented extensively to the agency on the dispute over the meaning of the VoIP symmetry rule. And AT&T does not dispute (AT&T Br. at 41), that under controlling Supreme Court precedent, an agency is entitled to broad deference in interpreting its rules. *See e.g.*, *Auer*, 519 U.S. at 461;

Udall v. Tallman, 380 U.S. 1, 16-17 (1965). Here, the Commission's interpretation of the VoIP symmetry rule was entirely reasonable.

The VoIP symmetry rule does not define the term "functional equivalent" in specifying that "end office access services" includes "any functional equivalent" of an incumbent's access service provided by a non-incumbent local exchange carrier. 47 C.F.R. § 51.903(d)(3). Nor does the rule define the term "comparable" in specifying that "functions provided by a [local exchange carrier] as part of transmitting telecommunications between designated points using . . . technology other than [time-division multiplexing] transmission in a manner that is comparable to a service offered by a local exchange carrier constitutes the functional equivalent of the incumbent local exchange carrier access service." 47 C.F.R. § 51.913(b). The terms "functional," and "comparable," necessarily leave in the agency's hands an opportunity for clarification.

Here, the Commission explained that "[i]n the case of a traditional [time-division multiplexed] call, [local switching] is accomplished by a local switch connecting the trunk to the termination line/end point phone device." *Declaratory Ruling* ¶28 (JA __). "In the case of a VoIP call, the call management system connects the packet stream crossing the Internet (transport) to the termination point (phone device)." *Id*. But "[i]n both cases,"

the Commission explained, "the connection between the transport and termination point is accomplished via call control functions," *id*.—"*i.e.*, the functions necessary to ensure call set-up, conduct, and take down." *Id.* The Commission concluded that "[t]he fact that an over-the-top VoIP provider and its competitive LEC partner perform functions different from those performed previously under a traditional [time-division multiplexing] architecture does not mean that they are not providing the functional equivalent of end office switching pursuant to the VoIP symmetry rule"—so long as they are providing call control, "the intelligence associated with call set-up, supervision and management." *Id.* [4]

Upon review of the record, the Commission found that "competitive [local exchange carriers] and their over-the-top VoIP partners undoubtedly provide the call intelligence associated with call set-up, supervision and

[4] The call intelligence necessary to properly complete calls using VoIP technology may occur at different points and use different equipment than with traditional switched calls, but the functionality between the two types of calls is equivalent. Thus, before VoIP traffic reaches the Internet, it must be accompanied by the signaling and intelligence necessary to ensure that it reaches its intended destination. The carrier or its VoIP partner must ensure that the call is set up with an appropriate Internet Protocol destination address, properly label and address each packet being transmitted, and ensure that the end-user device is notified and available to receive the packets. And this is true whether or not the VoIP call is transmitted using the VoIP provider's own underlying Internet transmission facilities.

management." *Declaratory Ruling* ¶29 (JA __). The record reflected, for example, that "the competitive [carrier] and VoIP partner determine call destination and directly code the call for receipt and decoding by the called party." *Id.* ¶29 n.105 (JA __). *See also* letter from Level 3 Communications, LLC and Bandwidth.com, Inc. to Marlene H. Dortch, Federal Communications Commission, Office of the Secretary (Aug. 3, 2013) at 7-8 (JA __) (asserting that "the infrastructure used to set up and route [over-the-top] VoIP calls is the same infrastructure used to route all other calls" and that "the functions performed by the switching equipment are the same for [over-the-top] VoIP as for all other calls," and detailing the functions performed for both over-the-top and other types of calls). The Commission therefore concluded that "the call control functions provided jointly by a competitive [carrier] and its over-the-top VoIP partner are the functional equivalent of end-office switching." *Declaratory Ruling* ¶29 (JA __). That determination was a reasonable interpretation of a validly promulgated Commission rule.

B. The *Declaratory Ruling* Did Not Amend The *2011 Transformation Order*.

AT&T does not contend that the terms of the VoIP symmetry rule foreclose the *Declaratory Ruling*'s determination that end office switching charges may be recovered by qualifying competitive carriers and non-

facilities based VoIP partners. Instead, AT&T contends that the "[*2011*] *Transformation Order*" that adopted the VoIP symmetry rule *itself* constitutes a rule, that the *2011 Transformation Order* clearly "established that only the switching of VoIP calls onto last-mile physical facilities that connect to end users is the functional equivalent of end office switching," AT&T Br. at 26; *accord id*. at 29, and that because this purported rule was so clear, the Commission's interpretation of its own purported rule in the *Declaratory Ruling* is due "no deference" at all, *id*. at 41. Indeed, AT&T goes so far as to contend that the *Declaratory Ruling*'s clarification of the VoIP symmetry rule effectively amended the *2011 Transformation Order* without notice and comment. AT&T Br. at 24. AT&T's contention is baseless.

1. The Portion of the *2011 Transformation Order* Discussing the VoIP Symmetry Rule Is Not Itself A Legislative Rule.

The only "legislative rule" (AT&T Br. at 25) the Commission adopted to address compensation for VoIP telephony traffic was the *VoIP symmetry rule*, which the *Declaratory Ruling* did not change. The pertinent discussion in the *2011 Transformation Order* provided the "statement of … basis and purpose" for the VoIP symmetry rule, *see* 5 U.S.C. § 553(c); it was not itself a rule. Thus, even had the *Declaratory Ruling* deviated from a clear contrary statement in the *2011 Transformation Order*, the agency would not have run

afoul of the Administrative Procedure Act's notice and comment requirements, which apply only to legislative rules. *See Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1203-4 (2015). In short, AT&T's arguments fail at their threshold assumption; the portion of the *2011 Transformation Order* explaining the VoIP symmetry rule did not constitute a rule separate and apart from the codified VoIP symmetry rule, and interpretation of the order did not require notice and comment.

2. The *2011 Transformation Order* Did Not Preclude Billing For End Office Switching Involving Over-The-Top VoIP Services.

In any event, the *2011 Transformation Order* did not address the issue in this case with clarity, much less unambiguously in AT&T's favor. As the Commission found, and AT&T does not dispute, within a few months after the rule took effect, industry members disagreed over whether competitive carriers that partner with over-the-top VoIP providers could collect end office switching charges. *Declaratory Ruling* ¶16 nn.54-55 (JA __); AT&T Br. at 15 n.4 (showing that disputes on end office switching charges had arisen by

June 2012).[5] Indeed, it appears that, other than AT&T (and, later, Verizon—which did not challenge such charges until more than a year after the *2011 Transformation Order* took effect, *Declaratory Ruling* ¶47 (JA __)), industry members generally understood that they were required to pay end office switching charges in situations involving over-the-top VoIP providers. *Declaratory Ruling* ¶16 n.54, ¶47 (JA __).[6] Thus, prior to the *Declaratory Ruling*, there was no settled understanding among industry participants of whether, pursuant to the VoIP symmetry rule, carriers that partner with over-the-top VoIP providers provide the functional equivalent of end office switching, and certainly no consensus in favor of AT&T's position.

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[5] AT&T observes that no one filed a complaint with the Commission over AT&T's failure to pay switched access charges. AT&T Br. at 15. Presumably, that is because the Commission has found that carriers may not use the Commission's complaint process as a collection mechanism for unpaid tariff charges. *See, e.g.*, *In the Matter of All Am. Tel. Co.*, 26 FCC Rcd 723, 727-28 (2011); *In the Matter of Tel-Central of Jefferson City, Mo.*, 4 FCC Rcd 8338, 8340-41 (1989), *pet. for review denied*, *Tel-Central of Jefferson City, Mo. v. FCC*, 920 F.2d 1039 (D.C. Cir. 1990).

[6] Without support, AT&T speculates (Br. at 53-54) that interexchange carriers that paid end office switching charges may have done so because of "negotiated resolutions" with competitive local exchange carriers. But a more straightforward explanation, and one that is consistent with the record, is that other carriers paid end office switching charges because they understood that such charges were authorized under the VoIP symmetry rule. *See e.g.*, *Declaratory Ruling* ¶47 n.169 (JA __).

In fact, the *2011 Transformation Order* stated that the authority to assess and collect access charges for VoIP telephone traffic does not depend on the "specific[] . . . technology used to perform the functions subject to the associated intercarrier compensation charges." *2011 Transformation Order*, 26 FCC Rcd at 18006 ¶940. Thus, a carrier may "charge the relevant intercarrier compensation for functions performed by it and/or its retail VoIP partner, regardless of whether the functions performed or the technology used correspond precisely to those used under a traditional [time-division multiplexed] architecture." *Id.*, 26 FCC Rcd at 18026-27 ¶970. The *2011 Transformation Order* did not otherwise specifically address the question of how intercarrier compensation rules would apply to over-the-top VoIP services.

a. *The YMax Order*. AT&T nonetheless claims that the *2011 Transformation Order* made clear that "only the switching of VoIP calls onto last-mile facilities that connect end users is the functional equivalent of end office switching." AT&T Br. at 26. In doing so, AT&T relies primarily on its contention that the *Transformation Order* "embraced the reasoning" of the Commission's prior decision in *AT&T Corp. v. YMax Communications Corp.*, 26 FCC Rcd 5742 (2011) ("*YMax Order*"). In that case, AT&T contends, "the Commission ruled that end office switching charges could not be imposed for

over-the-top VoIP services." AT&T Br. at 26. As we show below, pp. 26-27 *infra*, that is not what the Commission ruled in the *YMax Order*. But, as important, the *2011 Transformation Order* did not embrace the reasoning of the *YMax Order*, much less embed that decision into the VoIP symmetry rule.

The *2011 Transformation Order* refers to the *YMax Order* in only two places, both in footnotes.

The first reference, footnote 2026, simply cites the *YMax Order* as *an example* of the commonplace principle that "a carrier may not impose charges other than those provided for under the terms of its tariff." *2011 Transformation Order*, 26 FCC Rcd at 18027 ¶970 n.2026.

The second reference, in footnote 2028, provides a "*cf.*" cite to paragraphs 41 and 44 & n.120 of the *YMax Order* to support the proposition that the Commission's "rules do not permit a [local exchange carrier] to charge for functions performed neither by itself or its retail service … partner." *2011 Transformation Order*, 26 FCC Rcd at 18027 ¶970 & n.2028. AT&T suggests that, by citing to the *YMax Order* here, the *2011 Transformation Order* implicitly incorporated the Commission's assessment of whether the carrier *in that case* was providing end office switching. But the only point for which the *YMax Order* was cited in footnote 2028 was to make clear that a carrier could not charge for a service that neither it nor its

VoIP partner provided. The reference to the *YMax Order* does not speak to whether, under the VoIP symmetry rule, a carrier and its over-the-top VoIP partner provide the functional equivalent of end office switching. In fact, the footnote recognized that "access services might functionally be accomplished in different ways depending upon the network technology." 26 FCC Rcd at 18027 n.2028.[7]

In any event, the *YMax Order*—which was decided before the VoIP symmetry rule was adopted—was a fact-intensive adjudication of a formal complaint lodged against YMax that addressed specific circumstances, and sheds no light on the interpretation of "functional equivalence" in the VoIP symmetry rule. Instead, the *YMax Order* simply stands for the unremarkable proposition that a carrier may not assess intercarrier compensation charges if the services that the carrier provides do not conform to the description in the

[7] Moreover, a "cf." cite would be a remarkably indirect way of embracing the *YMax Order*. AT&T contends that a "cf" citation means that the decision being cited is "sufficiently analogous to lend support" to the assertion being made. AT&T Br. at 32-33. But AT&T creatively edits out the introductory clause in the Bluebook, which provides that the "[c]ited authority supports a proposition *different from* the main proposition but sufficiently analogous . . . ." The Bluebook, A Uniform System of Citation (19th ed. 2010 at 54-55) (emphasis added). The Bluebook adds that the citation's relevance must usually be explained, such as through a parenthetical. *Id.* at 55. AT&T cannot plausibly claim that the "cf" reference in footnote 2028 relied on or explicitly embraced any statements in the *YMax Order* regarding end office switching.

carrier's tariff. *YMax Order*, 26 FCC Rcd at 5748 ¶12 ("a carrier may lawfully assess tariffed charges only for those services specifically described in its applicable tariff"). The decision thus turned on the specific language included in YMax's federal tariff on file with the Commission. The Commission noted that YMax's tariff described end office switching as the place where customer or end user station loops are terminated to other station loops, trunks, or access facilities, and that "[*u*]*nder these Tariff provisions* . . . End Office Switching does not occur without 'terminations in the end office of end user lines.'" *YMax Order*, 26 FCC Rcd at 5756 ¶¶37-38 (emphasis added). The Commission's decision in the *YMax Order* hinged on the discrepancy between the descriptions in the tariff and the services that YMax actually provided.

Indeed, the Commission "emphasize[d]" that "this Order addresses *only* the particular language in YMax's Tariff and the specific configuration of YMax's network architecture, as described in the record." *YMax Order*, 26 FCC Rcd at 5743 n.7 (emphasis added). And the agency "express[ed] no view about whether or to what extent YMax's functions, if accurately

described in a tariff, would provide a lawful basis for any charges." *Id*, at 5749 n.55.[8]

b. *The Bureau Clarification Order.* AT&T also contends that the staff-level order *Connect America Fund*, 27 FCC Rcd 2142 (Wireline Comp. Bur. 2012) (*Bureau Clarification Order*) demonstrates that the Commission did not view basic call control functions as the functional equivalent of end office switching. AT&T Br. at 33. According to AT&T, the *Bureau Clarification Order* confirms AT&T's position that parties that do not deliver calls to the last-mile transmission facilities that serve called parties may not collect end office switching charges. AT&T Br. at 45. AT&T's reading of the *Bureau Clarification Order* is overbroad and inaccurate.

In the *Bureau Clarification Order*, the staff recited its understanding that YMax Communications Corp. was asking the Commission to affirm that, under the VoIP symmetry rule, a competitive local exchange carrier partnered with a VoIP provider may collect access charges at the full rate charged by the incumbent local exchange carrier (the so-called "benchmark level"), whenever the competitive carrier is providing "telephone numbers and *some*

[8] AT&T suggests that these caveats represent the Commission's *post hoc* attempt in the *Declaratory Ruling* to distinguish the *YMax Order*. AT&T Br. at 18, 31-32. But the caveats are in the *YMax Order* itself.

portion of the interconnection with the [telephone network], and regardless of how or by whom the last-mile transmission is provided." *Bureau Clarification Order*, 27 FCC Rcd at 2144 ¶4 (emphasis added). In other words, in the Bureau's view, YMax was asking the Bureau to authorize a carrier to collect the full benchmark rate for access charges "even if it includes functions that neither it nor its VoIP retail partner are actually providing." *Id.* The Bureau rejected YMax's proposal, concluding that, if adopted, it could enable double billing. *See Declaratory Ruling* ¶36 (JA__). AT&T appears to read the *Bureau Clarification Order* as saying that the Bureau decided that, *because* neither the carrier nor the VoIP partner provided last mile transmission, the carrier was precluded from charging for end office switching. But the Bureau's decision simply does not make that causal connection. A review of the *Bureau Clarification Order* makes clear that staff was focused on preventing the potential for double billing, not on the fact that a third party would own the last mile transmission facilities.

In the *Declaratory Ruling*, the Commission distinguished the proposal addressed in the *Bureau Clarification Order*, in which numerous carriers might be providing components of end office switching, from the situation addressed in the *Declaratory Ruling*, in which the carrier is providing the functional equivalent of end office switching functions in their entirety.

Declaratory Ruling ¶37, (JA__). The *Bureau Clarification Order* thus rejected an overbroad rule interpretation that could permit more than one carrier to charge for a single service; the decision did not purport to circumscribe the technology necessary for functional equivalence of end office switching. Contrary to AT&T's arguments, the staff-level *Bureau Clarification Order* does not find that, in order to assess end office switching charges, a provider must provide its own last mile transmission facilities.[9]

c. *Coretel Virginia*. AT&T also argues that "two courts have read the Commission's orders, particularly *YMax*, to foreclose a competitive [carrier] from charging for end office switching when it does not switch calls onto last mile facilities." AT&T Br. at 48. In support, AT&T cites *Coretel Virginia LLC v. Verizon Virginia LLC*, 2013 WL 1755199 (E.D. Va. 2013), *aff'd in part, rev'd in part, and remanded*, 752 F.3d 364 (4th Cir. 2014), private

[9] As for the 1997 Commission decision in *Petition for Reconsideration and Application for Review of RAO 21*, 12 FCC Rcd 10061, 10067 ¶11 (1997), which AT&T cites (Br. at 6-7, 29), that case focused on "the actual connection of lines and trunks" in affirming a 1992 staff-level accounting judgment about whether certain time-division multiplexed equipment should be included under the Commission's accounting rules as switching or circuit equipment, and is "necessarily tied to [time-division multiplexed]-based technologies." The decision, which long preceded the adoption of the VoIP symmetry rule, had nothing to do with what qualifies as the functional equivalent of end office switching in an Internet Protocol regime. *Declaratory Ruling* ¶38 & n.142 (JA __).

litigation in which the Commission was not a party and did not participate. But both the district and appellate court decisions support the key principle in the *YMax Order*, that in order to charge for services under a tariff, "a carrier must provide its services in exactly the way the carrier describes them in that tariff." *Coretel Virginia*, 752 F.3d at 374. It is apparent that the Fourth Circuit based its finding on the discrepancy between the service provided and the service described in the tariff, and (like the *YMax Order*) did not opine on whether a carrier could assess end office switching for calls delivered via the Internet, if such service charges were properly described in the carrier's tariff. *Id.* at 375.[10]

C. The *Declaratory Ruling* Reasonably Found That Carriers And Their Over-The-Top VoIP Providers May Furnish The Functional Equivalent Of End Office Switching Under The VoIP Symmetry Rule.

AT&T contends that the *2011 Transformation Order* did not purport to change the preexisting test for "functional equivalence," which it asserts "focuses on whether the services in question are 'different in any material functional respect.'" AT&T Br. at 34 (citing *Ad Hoc Telecomms. Users Comm. v. FCC*, 680 F.2d 790, 795 (D.C. Cir. 1982)). According to AT&T,

[10] Notably, neither the district nor the appellate court decision mentions the *2011 Transformation Order* or section 51.913, and neither considered the specific issue that was the subject of the Commission's *Declaratory Ruling*.

the *Declaratory Ruling*, by contrast, was based on a novel test of functional equivalence—a test that should have been promulgated via notice-and-comment rulemaking. *See* AT&T Br. at 34-41.

This argument rests on the false premise that the *Declaratory Ruling* modified the standard for functional equivalence adopted in the *2011 Transformation Order* and the VoIP symmetry rule. But AT&T provides no evidence to support this assertion, and indeed AT&T's brief demonstrates the fallacy of its argument. AT&T's claims about what may constitute the functional equivalent to end office switching focus exclusively on *technology*—"the physical linking of individual customer lines to high-capacity transport facilities," AT&T Br. at 35. But the Commission was clear when it adopted the VoIP symmetry rule in the *2011 Transformation Order* that the authority to impose access charges for VoIP telephone traffic depended on the *function* provided, not the *technology* used. *See* 47 C.F.R. § 51.913(b) (transmitting telecommunications using technology other than time-division multiplexed transmission, in a manner that is "comparable" to a service offered by a local exchange carrier constitutes the "functional equivalent" of the incumbent carrier's access service). *See Omnipoint Commc'ns Enter. v. Zoning Hr'g Bd. of Easttown Twp.*, 331 F.3d 386, 395 (3rd Cir. 2003) ("equivalency of function relates to the telecommunications services the

entity provides rather than to the technical particularities of its operations"). AT&T's technology-centric reading ignores the Commission's focus on functionality.

In the *2011 Transformation Order*, the Commission adopted, for the first time, a functional equivalency standard in the context of Internet Protocol services. The Commission correctly determined that additional guidance was necessary to resolve disputes about whether specific VoIP services provided the functional equivalent of certain time-division multiplexed services. Because the Commission was applying the concept of functional equivalency to compare new technology to old, the Commission reasonably determined, in the *Declaratory Ruling*, that the functional equivalency standard set forth in the VoIP symmetry rule requires a high-level, holistic consideration of what functions are equivalent, rather than focusing on whether the underlying technologies used to provide the service are similar. *Declaratory Ruling* ¶27 n. 100 (JA __). In doing so, the agency did not apply a "new" test for functional equivalence, *see* AT&T Br. at 34, but simply noted that application of the test must take account of the "variety of legal contexts" in which it arises. *Declaratory Ruling*, ¶27 n. 100 (JA __).

As the Commission explained, "[d]irect comparisons between [time-division multiplexed] architecture and IP network architecture cannot be

made precisely because IP-based networks do not involve the same types of physical connections as those found in traditional [time-division multiplexing] networks." *Declaratory Ruling* ¶27 (JA __). Thus, as this Court has recognized, the "functional equivalency test" has traditionally been "allowed to yield a determination that . . . services are 'like,' whether or not they are 'identical.'" *Ad Hoc*, 680 F.2d at 797.

Here, as we have explained, the Commission reasonably determined that competitive local exchange carriers and their VoIP provider partners provide the functional equivalent of end office switching when they "provide the call intelligence associated with call set-up, supervision and management." *Declaratory Ruling* ¶29 (JA__). That determination was based on a reasonable interpretation of the functional equivalency standard set forth in the rule.

D. The *Declaratory Ruling* Promotes The Goals Of The VoIP Symmetry Rule.

In the end, AT&T's position depends on the false premise that, in 2011, the Commission intended to allow asymmetrical compensation for over-the-top and facilities-based VoIP Providers with respect to end office switching charges. Nothing in the Commission's decision supports that position. The Commission considered, but did not adopt, different rules for over-the-top and facilities-based VoIP traffic. *See Transformation Order*

Notice of Proposed Rulemaking, 26 FCC Rcd 4554, 4747 ¶612 (2011) (seeking comment "on whether the Commission should distinguish between facilities-based 'fixed' and 'nomadic' interconnected VoIP"). To the contrary, the Commission was explicit that the new intercarrier compensation rules it adopted in the *2011 Transformation Order* applied to *all* VoIP telephone traffic. *See e.g.*, *2011 Transformation Order*, 26 FCC Rcd at 18025 ¶968 ("a symmetric approach to VoIP-[Public Switched Telephone Network] intercarrier compensation is warranted for all [local exchange carriers]").

In the *2011 Transformation Order*, the Commission considered and rejected numerous proposals that would have limited the applicability of the new intercarrier compensation regime to a subset of VoIP providers. *See 2011 Transformation Order*, 26 FCC Rcd at 18006-8 ¶¶941-2. The *Declaratory Ruling* reasonably held that the VoIP symmetry rule does not restrict the types of VoIP providers with which carriers may form partnerships and collect symmetrical access charges. *Declaratory Ruling* ¶21 (JA __).

AT&T argues that the rationale for the VoIP symmetry rule "was to avoid penalizing VoIP providers that had actually built neighborhood [Internet protocol]-based infrastructure and partnered with [carriers] that

switched VoIP calls onto these local facilities." AT&T Br. at 28.[11] *See also* AT&T Br. at 37 (asserting that the *2011 Transformation Order* "focused on the unfairness of denying end office switching charges to [carriers] that partner with cable companies"). But in doing so, the Commission made clear that it would permit compensation "for functions performed" by a competing carrier "and/or by its retail VoIP partner"—"regardless of whether the functions performed or the technology used correspond precisely to those used under a traditional [time-division multiplexing] architecture." 26 FCC Rcd at 18027 ¶970. *See also* 47 C.F.R. § 51.913(b)

AT&T contends, repeatedly, that it would be unfair to permit over-the-top VoIP providers (or their carrier partners) to charge for end office switching during the transition to the bill-and-keep system because those providers have not invested in last-mile facilities. *See* AT&T Br. at 38. But those arguments ignore the fact that even before the Commission adopted the *2011 Transformation Order*, a competitive local exchange carrier's tariffed

[11] AT&T twists the language in the *2011 Transformation Order*. The Commission was not trying to limit symmetrical compensation only to providers that had invested in Internet Protocol facilities. To the contrary, the Commission was seeking to ensure that such providers were not at a disadvantage relative to "those providers that have not yet undertaken that network conversion." *2011 Transformation Order*, 26 FCC Rcd at 18025 ¶968.

end office switching charges were not based on its individual costs. They were instead limited by the *incumbent carrier*'s rates.[12] Consequently, even *if* the competitive carrier's costs of providing service vary depending on whether the VoIP partner is facilities-based or over-the-top, that would have no bearing on the competitive carrier's permitted tariffed rates, which are limited by the incumbent carrier's rates. *See* 47 C.F.R. § 61.26(b), (c).

AT&T's argument also fails to address the fact that the transitional methodology is intended to provide a gradual transition to a bill-and-keep methodology, under which all carriers will recover their network costs through end user charges, not access charges.[13] The Commission did not

[12] *See, e.g.*, *In re FCC 11-161*, 753 F.3d at 1145 (the Commission has "disclaimed reliance on cost to set competitive [carrier] access rates" and instead benchmarked rates against the incumbent carrier's rates) (quoting *In re Access Charge Reform: PrairieWave Telecomms., Inc.*, 23 FCC Rcd 2556, 2560 ¶13 (2008)). *See also*, *In re Access Charge Reform*, 16 FCC Rcd 9923, 9939, 9941 ¶¶41, 45 (2001) (noting that establishing an objective standard for competitive carrier access rates is difficult and concluding that such rates should ultimately be equivalent to the switched access rate of the incumbent carrier in the competitive carrier's service area).

[13] The Commission chose to permit local exchange carriers to charge for and collect end office switching for *all* VoIP traffic during the transitional period before bill and keep was fully implemented. This was a policy choice, entitled to deference, and indeed warrants particular deference as a transitional or interim regulation. *Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1105 (D.C. Cir. 2009).

design the transitional intercarrier compensation rules to ensure ongoing cost recovery of sunk costs.

AT&T protests that the Commission's decision in the *Declaratory Ruling* "completely *severs the link between the historic cost-recovery rationale* for allowing end office switching charges and the network functions for which those charges may be imposed." AT&T Br. at 21 (emphasis added). But that is precisely what the *2011 Transformation Order* did.[14] As AT&T itself recognizes, in the *2011 Transformation Order*, the Commission "comprehensively reformed its intercarrier compensation rules." AT&T Br. at 12. In fact, the Commission determined that the complex and distorted intercarrier compensation provisions should, after a transitional period, give way to a bill-and-keep system (first for terminating access charges but ultimately for originating access as well). By adopting a bill-and-keep system, the Commission was expressly rejecting historic recovery mechanisms. Although AT&T strives to ignore these comprehensive changes,

[14] AT&T asserts that if the Commission had intended to "decouple[] end office switching charges from their cost recovery rationale, it surely would have offered some explanation for why that historic link is no longer required." AT&T Br. at 39. But the explanation is set forth throughout the *2011 Transformation Order*, including in the explanation of why a bill-and-keep intercarrier compensation scheme is the most rational and efficient recovery method.

it can hardly surprise AT&T that the *2011 Transformation Order* effectuated fundamental changes from historic cost recovery.

* * * * *

In sum, the Commission in the *Declaratory Ruling* did not amend the *2011 Transformation Order* or the VoIP symmetry rule. AT&T's criticism of the *Declaratory Ruling* is, at bottom, a policy disagreement with the way the Commission interpreted the VoIP symmetry rule. But that policy disagreement provides no basis for overturning the *Declaratory Ruling*; the *Declaratory Ruling*'s reading of the VoIP symmetry rule was not inconsistent either with the rule's provisions or with historic precedent.

II. AT&T HAS NOT OVERCOME THE PRESUMPTION THAT THE *DECLARATORY RULING* SHOULD BE EFFECTIVE RETROACTIVELY.

As a fallback position, AT&T contends that, even if the Court upholds the Commission's decision to proceed through the *Declaratory Ruling*, that adjudication should only have prospective effect. AT&T Br. at 43-55.

But as AT&T well knows, "retroactivity," not prospectivity, "is the norm in agency adjudications" like the *Declaratory Ruling* at issue here. *AT&T Co. v. FCC*, 454 F.3d at 332. There is thus a "presumption of retroactivity for [such] adjudications." *Qwest*, 509 F.3d at 539.

AT&T contends that the presumption does not apply here because the *Declaratory Ruling* "substitute[s] new law for old law that was reasonably clear." AT&T Br. at 44 (citing *Verizon Tel. Cos. v. FCC*, 269 F.3d 1098, 1109 (D.C. Cir. 2001)). In making this argument, AT&T relies solely on the *Bureau Clarification Order*—the only decision AT&T can point to that post-dates the *2011 Transformation Order*—which (AT&T maintains) "confirmed" that "no matter what type of technology is employed, a party that does not provide interconnection to [a] consumer's individual line may not collect end office switching charges for a VoIP call." AT&T Br. at 45. But, as we have explained, *see* pp. 28-30 *supra*, the *Bureau Clarification Order* did not address the issue of functional equivalence under the *2011 Transformation Order*. *See Declaratory Ruling*, ¶37 (JA__). Instead, that order involved a claim for access charge recovery based on providing "telephone numbers and *some portion* of the interconnection with the [public switched telephone network]"—not "the functional equivalent of all of the end office switching functions." *Id*. (emphasis added). The *Bureau*

Clarification Order thus did not establish settled law that the *Declaratory Ruling* contravened and upon which parties could reasonably have relied.[15]

AT&T also contends that, despite the presumption in favor of retroactivity, retroactive application of the *Declaratory Ruling* would result in "manifest injustice." AT&T Br. at 48-55. But there is no manifest injustice here. Contrary to AT&T's argument, agency precedents had not "clearly pointed toward the opposite result." AT&T Br. at 49 (citing *AT&T*, 454 F.2d at 332-33). Indeed, it was precisely because the issue was unsettled, and parties were embroiled in disputes, that the Commission issued the *Declaratory Ruling*. *See Declaratory Ruling* ¶¶16-17 (JA__-__). And, as the Commission noted, other than AT&T (and later Verizon), there is no

[15] Indeed, it can reasonably be questioned whether a single Bureau order, even if it were clearer on the relevant issue, can suffice to establish settled law. *See Clark-Cowitz Joint Operating Agency v. FERC*, 826 F.2d 1074, 1083 (D.C. Cir. 1987) (en banc) (ruling in "solitary proceeding can scarcely be viewed as 'well established'"); *Comcast Corp. v. FCC*, 526 F.3d 763, 770 (D.C. Cir. 2008) ("unchallenged staff decisions are not Commission precedent").

evidence of any other interexchange carrier disputing payment for end office switching access charges for over-the-top VoIP traffic. *Id*. ¶45 (JA __).[16]

AT&T contends that, whatever other parties did, it "consistently took the position" that the *2011 Transformation Order* did not permit local exchange carriers to collect end office switching charges when they partner with over-the-top VoIP providers. AT&T Br. at 53. But as this Court has recognized, "[t]he mere possibility that a party may have relied on its own (rather convenient) assumption that unclear law would ultimately be resolved in its favor is insufficient to defeat the presumption of retroactivity when that law is finally clarified." *Qwest*, 509 F.3d at 540. In this case, "[r]ather than exercising caution in light of ambiguous agency law, AT&T unilaterally chose not to pay . . . without Commission sanction or approval." *AT&T*, 454

[16] AT&T suggests (Br. at 49 & n.15) that retroactive application of the Commission's reading of its rules would lead to manifest injustice because the Commission's reading is not "the most natural [one]." But it concedes that this Court's cases have not looked to "whether the petitioner, or instead the agency, had the 'most natural' or 'most reasonable' interpretation of the agency's prior decisions." *Id*. n.15. And it would be particularly odd to conclude that there is manifest injustice because the Commission did not adopt AT&T's reading of the agency's rule here, since, as we have explained, the Commission's interpretation of its rules is "controlling unless 'plainly erroneous or inconsistent with the regulation.'" *Auer*, 519 U.S. at 461 (citation omitted).

F.3d at 334. In so doing, it "was taking its chances" and "assumed the risk of an adverse Commission decision." *Id*. at 333, 334.[17]

In short, as the Commission reasonably concluded, "given the language of the [VoIP symmetry rule], the limits of the text of [the Commission's] prior decisions, and the ongoing disputes in the record regarding the interpretation of the rule," it was not "reasonable" for AT&T to rely on its position the end office switching charges were not payable to competitive local exchange carriers in partnership with over-the-top VoIP providers. *Declaratory Ruling*, ¶46 (JA__). There is thus no manifest injustice from retroactive application of the *Declaratory Ruling* to AT&T.

CONCLUSION

The petition for review should be denied.

[17] AT&T appears to contend that a higher standard should apply when the agency's determination "requires the payment of money." *See* AT&T Br. at 49-50. That contention finds no support in this Court's cases—both *AT&T* and *Qwest* examined whether there was manifest injustice without applying any additional barrier because in those cases, like this one, the Commission's determination would result in the payment of money for services that pre-dated the agency's ruling. To the extent that AT&T relies on cases about fines or penalties, those cases are inapposite. AT&T is merely being required to pay access charges that it owes under the Commission's rules.

Respectfully submitted,

WILLIAM J. BAER
ASSISTANT ATTORNEY GENERAL

ROBERT B. NICHOLSON
ROBERT J. WIGGERS
ATTORNEYS

UNITED STATES
DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20530

JONATHAN B. SALLET
GENERAL COUNSEL

DAVID M. GOSSETT
DEPUTY GENERAL COUNSEL

JACOB M. LEWIS
ASSOCIATE GENERAL COUNSEL

RICHARD K. WELCH
DEPUTY ASSOCIATE GENERAL
COUNSEL

/s/ Lisa S. Gelb

LISA S. GELB
COUNSEL

FEDERAL COMMUNICATIONS
COMMISSION
WASHINGTON, D.C. 20554
(202) 418-1740

October 5, 2015

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AT&T CORP., PETITIONER, v. FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS.	NO. 15-1059

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying Brief for Respondents in the captioned case contains 9,204 words.

/s/ Lisa S. Gelb
Lisa S. Gelb
Counsel
Federal Communications Commission
Washington, D.C. 20554
(202) 418-1740 (Telephone)
(202) 418-2819 (Fax)

October 5, 2015

Addendum

5 U.S.C. § 554(e)

UNITED STATES CODE ANNOTATED
TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES
PART I. THE AGENCIES GENERALLY
CHAPTER 5. ADMINISTRATIVE PROCEDURE
SUBCHAPTER II. ADMINISTRATIVE PROCEDURE

§ 554. Adjudications

* * * * *

(e) The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.

47 C.F.R. § 1.2(a)

CODE OF FEDERAL REGULATIONS
TITLE 47. TELECOMMUNICATION
CHAPTER I. FEDERAL COMMUNICATIONS COMMISSION
SUBCHAPTER A. GENERAL
PART 1. PRACTICE AND PROCEDURE
SUBPART A. GENERAL RULES OF PRACTICE AND PROCEDURE - GENERAL

§ 1.2 Declaratory rulings.

(a) The Commission may, in accordance with section 5(d) of the Administrative Procedure Act, on motion or on its own motion issue a declaratory ruling terminating a controversy or removing uncertainty.

* * * * * *

47 C.F.R. § 51.713

CODE OF FEDERAL REGULATIONS
TITLE 47. TELECOMMUNICATION
CHAPTER I. FEDERAL COMMUNICATIONS COMMISSION
SUBCHAPTER B. COMMON CARRIER SERVICES
PART 51. INTERCONNECTION
SUBPART H. RECIPROCAL COMPENSATION FOR TRANSPORT AND TERMINATION OF TELECOMMUNICATIONS TRAFFIC

§ 51.713 Bill-and-keep arrangements.

Bill-and-keep arrangements are those in which carriers exchanging telecommunications traffic do not charge each other for specific transport and/or termination functions or services.

47 C.F.R. 51.903(d)

CODE OF FEDERAL REGULATIONS
TITLE 47. TELECOMMUNICATION
CHAPTER I. FEDERAL COMMUNICATIONS COMMISSION
SUBCHAPTER B. COMMOND CARRIER SERVICES
PART 51. INTERCONNECTION
SUBPART J. TRANSITIONAL ACCESS SERVICE PRICING

§ 51.903 Definitions.

For the purposes of this subpart:

* * * * * *

(d) End Office Access Service means:

(1) The switching of access traffic at the carrier's end office switch and the delivery to or from of such traffic to the called party's premises;

(2) The routing of interexchange telecommunications traffic to or from the called party's premises, either directly or via contractual or other arrangements with an affiliated or unaffiliated entity, regardless of the specific functions provided or

facilities used; or

(3) Any functional equivalent of the incumbent local exchange carrier access service provided by a non-incumbent local exchange carrier. End Office Access Service rate elements for an incumbent local exchange carrier include the local switching rate elements specified in § 69.106 of this chapter, the carrier common line rate elements specified in § 69.154 of this chapter, and the intrastate rate elements for functionally equivalent access services. End Office Access Service rate elements for an incumbent local exchange carrier also include any rate elements assessed on local switching access minutes, including the information surcharge and residual rate elements. End office Access Service rate elements for a non-incumbent local exchange carrier include any functionally equivalent access service.

Note to paragraph (d): For incumbent local exchange carriers, residual rate elements may include, for example, state Transport Interconnection Charges, Residual Interconnection Charges, and PICCs. For non-incumbent local exchange carriers, residual rate elements may include any functionally equivalent access service.

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47 C.F.R. § 51.913

CODE OF FEDERAL REGULATIONS
TITLE 47. TELECOMMUNICATION
CHAPTER I. FEDERAL COMMUNICATIONS COMMISSION
SUBCHAPTER B. COMMON CARRIER SERVICES
PART 51. INTERCONNECTION
SUBPART J. TRANSITIONAL ACCESS SERVICE PRICING

§ 51.913 Transition for VoIP–PSTN traffic.

(a)(1) Terminating Access Reciprocal Compensation subject to this subpart exchanged between a local exchange carrier and another telecommunications carrier in Time Division Multiplexing (TDM) format that originates and/or terminates in IP format shall be subject to a rate equal to the relevant interstate terminating access charges specified by this subpart. Interstate originating Access Reciprocal Compensation subject to this subpart exchanged between a local exchange carrier and another telecommunications carrier in Time Division Multiplexing (TDM) format that originates and/or terminates in IP format shall be subject to a rate equal to the relevant interstate originating access charges specified by this subpart.

(2) Until June 30, 2014, intrastate originating Access Reciprocal Compensation subject to this subpart exchanged between a local exchange carrier and another

telecommunications carrier in Time Division Multiplexing (TDM) format that originates and/or terminates in IP format shall be subject to a rate equal to the relevant intrastate originating access charges specified by this subpart. Effective July 1, 2014, originating Access Reciprocal Compensation subject to this subpart exchanged between a local exchange carrier and another telecommunications carrier in Time Division Multiplexing (TDM) format that originates and/or terminates in IP format shall be subject to a rate equal to the relevant interstate originating access charges specified by this subpart.

(3) Telecommunications traffic originates and/or terminates in IP format if it originates from and/or terminates to an end-user customer of a service that requires Internet protocol-compatible customer premises equipment.

(b) Notwithstanding any other provision of the Commission's rules, a local exchange carrier shall be entitled to assess and collect the full Access Reciprocal Compensation charges prescribed by this subpart that are set forth in a local exchange carrier's interstate or intrastate tariff for the access services defined in § 51.903 regardless of whether the local exchange carrier itself delivers such traffic to the called party's premises or delivers the call to the called party's premises via contractual or other arrangements with an affiliated or unaffiliated provider of interconnected VoIP service, as defined in 47 U.S.C. 153(25), or a non-interconnected VoIP service, as defined in 47 U.S.C. 153(36), that does not itself seek to collect Access Reciprocal Compensation charges prescribed by this subpart for that traffic. This rule does not permit a local exchange carrier to charge for functions not performed by the local exchange carrier itself or the affiliated or unaffiliated provider of interconnected VoIP service or non-interconnected VoIP service. For purposes of this provision, functions provided by a LEC as part of transmitting telecommunications between designated points using, in whole or in part, technology other than TDM transmission in a manner that is comparable to a service offered by a local exchange carrier constitutes the functional equivalent of the incumbent local exchange carrier access service.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AT&T Corp., Petitioner, v. FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, Respondents.	**No. 15-1059**

CERTIFICATE OF SERVICE

I, Lisa S. Gelb, hereby certify that on October 5, 2015, I electronically filed the Brief for Respondents with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

Peter D. Keisler
David L. Lawson
James P. Young
Kwaku Akowuah
Sidley Austin, LLP
1501 K Street, N.W.
Washington, DC 20005
Counsel for: AT&T Corp.

Robert B. Nicholson
Robert J. Wiggers
U.S. Department of Justice
Antitrust Division, Appellate Section
Room 3228
950 Pennsylvania Avenue, NW
Washington, DC 20530
Counsel for: USA

Gary L. Phillips
AT&T Services Inc.
1120 20th Street, NW
Suite 1000
Washington, DC 20036
Counsel for: AT&T, Inc.

Christopher J. Wright
John T. Nakahata
Timoty J. Simeone
Harris, Wiltshire & Grannis
1919 M Street, N.W., 8th Floor
Washington, D.C. 20036
Counsel for: Level 3 Comm.

Joshua M. Bobeck
Morgan, Lewis & Bocklus
2020 K Street, N.W.
Washington, D.C. 20016
Counsel for: Bandwidth.com

Charles A. Zdebski
Jeffrey P. Brundage
Eckert, Seamans, Cherin
& Mellott
1717 Pennsylvania Ave., N.W.
12th Floor
Washington, D.C. 20006
Counsel for: Broadvox-CLEC

/s/ Lisa S. Gelb